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FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

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1. A photograph of the old diversion works constructed on Valley Creek.
2. A polaroid photograph of an old ditch and ten acres which the Applicant testified had been irrigated in the past and which he proposes to irrigate by way of his past right and with this permit providing supplemental water.
3. A polaroid photograph showing the north end of the south field which the Applicant proposes to irrigate by way of previous rights and with this permit providing supplemental water.
4. A polaroid photograph of a ten acre field which the Applicant proposes to irrigate by way of previous rights and through this permit providing supplemental water.
5. A map of Township 1 South, Range 22 East, Stillwater County, which shows the general ownership along Valley Creek in the area in question.

The Objector, Mr. Jake Frank, offered into evidence three exhibits, to wit:

A. A map indicating the Frank Ranch, the John and Bette Mohr property, and the Yellowstone Grain Company property, which is now the Steinmetz property. The Frank property was colored in green, the Mohr property is in light brown or orange, and the Steinmetz property in a red or pink color. The map further indicates wells and reservoirs located on the Frank Ranch.

B. This is a map very similar to map, Exhibit A, but indicates the different pastures found on the Frank Ranch. It further indicates each of the watering areas along Valley Creek for the Frank Ranch.

Both exhibits A and B of the Objector, Mr. Frank, were drawn by WACO Engineering of Columbus, Montana.

C. Is a summary of measurements taken by WACO Engineering of Columbus at the upper watering spot (point A) and the lower watering spot (point B) on the Frank Ranch on Valley Creek. These flow measurements were taken on June 22, 1977 and the results were at Point A-230 gpm and at Point B-270 gpm.

Administrative Notice was also taken of the application by Jake Frank to appropriate water from Valley Creek at points in the N½ SE¼ and SE¼ SW¼, both Section 27, Township 1 South, Range 22 East, M.P.N., Stillwater County, Montana. The water sought to be appropriated would be used for a new sprinkler from May 1 to September 1, inclusive, of each year, on a total of 20 acres, more or less, the SW¼ of Section 27, Township 1 South, Range 22 East, Stillwater County, Montana. The water sought to be appropriated by the application would be diverted at a rate not to exceed 0.56 cubic feet per second or 300 gallons per minute and a quantity of 40 acre-feet per annum. The proposed point of diversion and the proposed place of use under this application by the Objector, Mr. Jake Frank, is located upstream from the proposed points of diversion of Mr. John Mohr and Mr. Henry Steinmetz. This application was submitted on September 13, 1976.

A Proposed Order (Proposal for Decision) dated January 9, 1978 was issued by the Hearing Examiner Gary L. Spaeth.

The Proposed Order Notice as issued on January 9, 1978 provided that the Proposed Order would not become final until accepted by the Administrator of the Water Resources Division of the Department of Natural Resources and Conservation. Written exceptions to the Proposed Order, if any, shall be mailed to the Department within ten (10) days after receipt of service of the Proposal for Decision upon parties herein. No extensions of time for filing exceptions will be granted. Upon receipt of any written exceptions opportunity will be provided to file briefs and to make oral arguments before the Administrator of the Water Resources Division.

On January 19, 1978 the Department received an Exception (Frank's Objections to Proposal for Decision dated January 9, 1978) dated January 17, 1978 filed by John C. Sheehy on behalf of his client Jake Frank. The Department by letter of January 27, 1978 to Mr. Sheehy and with a copy to all other parties in this matter, acknowledged receipt of his Exception and advised him of their opportunity to file a Brief supporting their Exceptions within fifteen (15) days after receipt of the Department's letter.

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On January 20, 1978 the Department received "Applicant Henry E. Steinmetz Reply to Objections Filed by Jake Frank dated January 17, 1978," dated January 19, 1978 as filed by Richard Heard on behalf of his client Henry Steinmetz. Also attached to the above document filed by Mr. Heard was a "Brief in Support of Application and Closing Comments," dated July 11, 1977. (This date is probably in error and should properly be January 11, 1978.) The Department by letter of January 27, 1978 to Mr. Heard, acknowledged receipt of his filed documents.

By letter of January 27, 1978 to William Blenkner, attorney for John Mohr, the Department advised of the documents filed by Mr. Sheehy and Mr. Heard and enclosed copies of each.

On February 7, 1978 the Department received Mr. Sheehy's "Brief of Jake Frank, as Objector to the Applications and the Proposal for Decision", dated February 6, 1978. Also attached was their "Proposed Findings and Conclusions submitted by Objector, Jake Frank."

The Department by letter of February 17, 1978 to Mr. Sheehy acknowledged receipt of his Brief together with the proposed findings and conclusions, dated February 6, 1978 as filed on behalf of his client, Jake Frank. Mr. Sheehy was advised that a copy of his Brief would be sent to Mr. Heard and Mr. Blenkner and they would be afforded the opportunity to file a Reply Brief in response to Mr. Sheehy's Exceptions and Brief. Mr. Sheehy was also requested to inform the Department in writing if he wanted to present oral argument before the Administrator, or decline to do so, thereby relying on the Administrator to review his Exceptions and Brief in reaching a final decision.

The Department by letters of February 17, 1978 to Mr. Heard and Mr. Blenkner, advised them of their opportunity to file on behalf of their respective clients a Reply Brief within fifteen (15) days after receipt of the Department's letter in response to Mr. Sheehy's Exception and Brief. They were also requested to inform the Department in writing if they wished to make oral argument before the Water

Resources Division Administrator. If oral argument is not requested the Administrator would review the entire application record, including all exceptions and briefs, before making his Final Order.

On February 21, 1978 the Department received a letter from Mr. Sheehy requesting an oral argument hearing on behalf of his client, Mr. Frank. The Department by letter of February 22, 1978 acknowledged receipt of his letter and request for an oral argument hearing and informed him after the Reply Briefs are filed by Mr. Heard and Mr. Blenkner on behalf of their clients, the applications would be forwarded to the Administrator for scheduling of the requested oral argument hearing.

On February 23, 1978 the Department received a letter from Mr. Heard stating he would be filing a Reply Brief on behalf of his client and would like to participate in the oral argument hearing requested by Mr. Sheehy. The Department by letter of February 27, 1978 to Mr. Heard acknowledged receipt of this letter and advised him that all parties in this matter would be notified of the requested oral argument hearing when scheduled by the Administrator of the Water Resources Division.

Mr. Heard by letter of March 1, 1978 to the Department requested additional time up to March 10, 1978 in which to file a Reply Brief. The Department by letter of March 6, 1978 to Mr. Heard granted additional time up to March 10, 1978 in which to file his Reply Brief in response to Mr. Sheehy's Exception and Brief.

On March 10, 1978 the Department received Mr. Heard's Reply Brief, dated March 9, 1978 as filed on behalf of his client Mr. Steinmetz in direct response to the Exception and Brief filed by Mr. Sheehy on behalf of his client Mr. Jake Frank. The Department by letter of March 14, 1978 to Mr. Heard acknowledged receipt of his Reply Brief and advised him that the Department was waiting for a reply to its letter of February 17, 1978 from Mr. Blenkner on behalf of his client John Mohr concerning his Application No. 7527-s-4300. However, if a Reply Brief was not received from Mr. Blenkner by March 27, 1978 the Application files would be forwarded to the

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Administrator of the Water Resources Division for scheduling of the requested oral argument hearing.

The Department by letter of March 14, 1978 to Mr. Blenkner advised him that his Reply Brief had not been received nor an extension of time requested beyond the fifteen day period provided by the Department previously in its letter of February 17, 1978.

On March 27, 1978 the Department received Mr. Blenkner's "Brief in Support of Application", dated March 23, 1978 and filed on behalf of his client Mr. Mohr in direct response to the Exception and Brief filed by Mr. Sheehy. The Department by letter of April 3, 1978 to Mr. Blenkner acknowledged receipt of his Brief and advised him that Application No. 7869-s43QJ by Henry E. Steinmetz and 9527-s43QJ by John W. Mohr would be forwarded to the Administrator for scheduling of the requested oral argument hearing by Mr. Sheehy. Copies of said letter were also sent to Mr. Sheehy, Mr. Frank, Mr. Heard, Mr. Steinmetz, and Mr. Mohr.

On June 20, 1978 the Administrator issued a Notice of Oral Argument Hearing on Exceptions to Proposal for Decision in the matter of Application for Beneficial Water Use Permit No. 7869-s43QJ by Henry E. Steinmetz and No. 9527-s43QJ by John W. Mohr. The Notice stated that on Thursday, July 13, 1978 at 1:30 p.m. an oral argument hearing would be held before the Administrator of the Water Resources Division in the Conference Room of the Department of Natural Resources and Conservation Building, 32 South Ewing, Helena, Montana. The purpose of the hearing is to hear oral arguments on the filed exceptions and briefs. Oral arguments must be on the established record and no new evidence can be introduced. Parties herein were requested to notify the Administrator in writing before the hearing if they did not wish to attend, which in such case the exceptions and briefs would stand as filed.

On July 7, 1978 the Department received a letter dated July 6, 1978 from Mr. Heard, stating that he and his client had decided to waive their right to oral argument and stand on the testimony and briefs as filed. On July 13, 1978 the

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Department received a letter dated July 12, 1978 from Mr. Blenkner which stated that he and his client would not be present for the July 13, 1978 oral argument hearing.

The oral argument hearing before the Administrator was held in the Conference Room of the Department of Natural Resources and Conservation Building, 32 South Ewing, Helena, Montana at 1:30 p.m. on July 13, 1978 for the purpose of hearing oral arguments by the Applicants and Exceptor.

The Applicant, Mr. Henry E. Steinmetz was not present, nor was his attorney Mr. Heard. The Applicant John W. Mohr also was not present, nor was his attorney, Mr. Blenkner.

The Exceptor, Jake Frank was present and was represented by his attorney Mr. Rod Hartman.

The hearing was also attended by Don MacIntyre, Chief Legal Counsel for the Department and Ronald Guse, Assistant Chief of the Department's Water Rights Bureau.

The Administrator of the Department's Water Resources Division hereby makes the following Final Order, based on the Hearing Examiner's Proposal for Decision of January 9, 1978, the applications, objections, exceptions, briefs, the testimony of the oral argument hearing held in Helena on July 13, 1978, both hearing tape recordings, and all pertinent information and documents filed by parties to this matter, and made a permanent record of the two application files.

The Proposed Findings of Fact, Conclusions of Law, and Order in this matter, as entered on January 9, 1978 by the Hearing Examiner, are hereby adopted as the Final Findings of Fact, Conclusions of Law, and Order, except that the Proposed Order is modified as follows:

FINAL ORDER

1. Subject to the conditions cited below, the Applicant's Provisional Permit No. 9527-s43Qd by John W. Mohr is hereby granted allowing for the appropriation of 2.49 cubic feet per second or 1,122 gallons of water per minute, not to exceed 176.4 acre-feet per annum from Valley Creek, a tributary of the Yellowstone River in Stillwater County, Montana, to be diverted from Valley Creek by means of a portable

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pump, at two points in the NE $\frac{1}{4}$ SW $\frac{1}{4}$ NE $\frac{1}{4}$ and at one point in the SW $\frac{1}{4}$ NW $\frac{1}{4}$ NE $\frac{1}{4}$, all in Section 34, Township 1 South, Range 22 East, M.P.M., and used for new irrigation on 45 acres and for supplemental irrigation on 30 acres, all in said Section 34, and containing a total of 75 acres, more or less, from May 1 to October 10, inclusive, of each year.

2. Subject to the conditions cited below, the Applicant's Provisional Permit No. 7869-s430J by Henry E. Steinmetz is hereby granted allowing for the appropriation of 1.33 cubic feet per second or 600 gallons of water per minute, not to exceed 170 acre-feet per annum from Valley Creek, a tributary of the Yellowstone River in Stillwater County, Montana, to be diverted from Valley Creek by means of a portable pump, at points in the SW $\frac{1}{4}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 35, Township 1 South, Range 22 East, M.P.M. and the NW $\frac{1}{4}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 2, Township 2 South, Range 22 East, M.P.M., and used for new irrigation on 20 acres in Section 35, Township 1 South, Range 22 East, M.P.M., and 35 acres in Section 2, Township 2 South, Range 22 East, M.P.M., and containing a total of 55 acres, more or less, from May 1 to September 30, inclusive, of each year.

3. This Final Order in itself does not substantiate those certain specific water rights claimed by the Applicants, John W. Mohr and Henry E. Steinmetz or the Objector Jake Frank, as they relate to their priorities and quantities. The decisive priorities and quantities for the water rights claimed by the above said parties must properly be settled in a court of law at the time of the final determination or adjudication of said specific claimed water rights.

4. The order of priority for the Provisional Permits granted to Messrs. Mohr, Steinmetz and Frank pursuant to Section 89-380, R.C.M. 1947, are as follows:

- A. Application No. 7869-s430J by Henry E. Steinmetz, priority date April 1, 1976 at 11:10 a.m.
- B. Application No. 9527-s430J by John W. Mohr, priority date September 11, 1976 at 6:27 p.m.
- C. Application No. 9479-s430J by Jake Frank, priority date September 13, 1976 at 1:40 p.m.

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5. The Applicants shall install and maintain adequate measuring devices to enable the Applicants to keep a record of all quantities of water pumped and used, as well as, the periods of such diversion and use. A permanent log record shall be kept showing the above data. Such records shall be presented to the Department of Natural Resources and Conservation for inspection upon demand by the Department.

6. It shall be the responsibility of the Applicants to cease diverting water immediately pursuant to these Provisional Permits when there is insufficient water in Valley Creek to satisfy all claimed prior water rights of the Objector, other prior downstream water right users, and the water use granted by these Provisional Permits. It shall be the responsibility of each of the parties herein not to abuse his water rights at the expense of the other.

7. The Applicants shall not under these Provisional Permits reduce the flow of Valley Creek below 270 gallons per minute at the Frank Ranch livestock watering point in Section 2, Township 2 South, Range 22 East, M.P.M., when Mr. Frank or his successor in interest has a beneficial need for said water for livestock watering purposes. At no time shall the Applicants be allowed to completely eliminate the flow of water at said watering point, or pump Valley Creek dry at any time. It shall be the responsibility of the Applicants to ensure that the Frank Ranch has sufficient quantities of livestock water at said watering point prior to their pumping of water from Valley Creek for the purposes granted herein.

8. The issuing of the Provisional Permits by the Department in no way reduces the Applicants' liability for damages caused by the Applicants' exercise of their Provisional Permits, nor does the Department, in issuing the Provisional Permits, in any way acknowledge liability for damage caused by the Applicants' exercise of their Provisional Permit.

9. The granting of the Provisional Permits in no way grants the Applicants any right to violate real property rights of any other party, nor does it excuse the Applicants from any liability for same, even if such violation is a necessary and unavoidable consequence of exercising their Provisional Permits.

10. The Provisional Permits are granted subject to all prior water rights in the source of supply, and any final determination of prior existing water rights in the source of supply as provided for by Montana law.

11. The Provisional Permits are granted subject to the rights of the Department to revoke the permits in accordance with Section 89-887, R.C.M. 1947, and to enter onto the premises for investigative purposes in accordance with Section 89-898, R.C.M. 1947.

12. The above conditions to the granting of these Provisional Permits shall hold in full effect for any successor in interest to the Applicants herein named.

RECOMMENDATION

The Department recommends that all parties in this matter install and maintain adequate measuring devices to fit their particular individual situation, and keep a log of records of water used for their own proof of their water rights and protection.

Done this 15th day of December, 1978



Administrator, Water Resources Division
DEPARTMENT OF NATURAL RESOURCES AND
CONSERVATION

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BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

IN THE MATTER OF APPLICATIONS)
FOR BENEFICIAL WATER USE)
PERMIT NO. 7869-s43QJ BY)
HENRY E. STEINMETZ AND NO.)
9527-s43QJ BY JOHN W. MOHR)

PROPOSAL FOR DECISION

Pursuant to the Montana Water Use Act, and the Montana Administrative Procedures Act, after due notice, a hearing on objections to the above-described applications was held in Room 201 of the Yellowstone County Courthouse, Billings, Montana, at approximately 9:00 a.m. on July 1, 1977, Gary L. Spaeth, Hearing Examiner, presiding.

Both Applicants appeared and presented testimony on behalf of their applications and were represented by counsel. The Applicant, Mr. Henry E. Steinmetz, was represented by Mr. Richard W. Heard of the law firm of Grant & Heard of Columbus, Montana and the other Applicant, Mr. John W. Mohr, was represented by Mr. William Blenkner of the law firm of Blenkner and Laws, also of Columbus, Montana.

An objection was filed to both of the above applications by Mr. Jake Frank of Park City, Montana. Mr. Frank was represented by Counsel, Mr. John C. Sheehy of the firm of Hutton, Sheehy & Cromley of Billings, Montana. Mr. Jake Frank appeared on behalf of his objection and presented testimony and evidence.

Mr. Don Riddle of the Billings office of the Department of Natural Resources and Conservation appeared and presented

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testimony on behalf of the Department.

A field inspection of the area was conducted by the Hearing Examiner on June 30, 1977. None of the parties or their representative was present during such investigation.

EXHIBITS

The Applicant, Mr. Henry E. Steinmetz, offered into evidence five exhibits, to wit:

1. A photograph of the old diversion works constructed on Valley Creek.
2. A polaroid photograph of an old ditch and ten acres which the Applicant testified had been irrigated in the past and which he proposes to irrigate by way of his past right and with this permit providing supplemental water.
3. A polaroid photograph showing the north end of the south field which the Applicant proposes to irrigate by way of previous rights and with this permit providing supplemental water.
4. A polaroid photograph of a ten acre field which the Applicant proposes to irrigate by way of previous rights and through this permit providing supplemental water.
5. A map of Township 1 South, Range 22 East, Stillwater County, which shows the general ownership along Valley Creek in the area in question.

The Objector, Mr. Jake Frank, offered into evidence three exhibits, to wit:

- A. A map indicating the Frank Ranch, the John and Bette Mohr property, and the Yellowstone Grain Company property, which is now the Steinmetz property. The Frank

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property was colored in green, the Mohr property is in light brown or orange, and the Steinmetz property in a red or pink color. The map further indicates wells and reservoirs located on the Frank Ranch.

B. This is a map very similar to map, Exhibit A, but indicates the different pastures found on the Frank Ranch. It further indicates each of the watering areas along Valley Creek for the Frank Ranch.

Both exhibits A and B of the Objector, Mr. Frank, were drawn by WACO Engineering of Columbus, Montana.

C. Is a summary of measurements taken by WACO Engineering of Columbus at the upper watering spot (point A) and the lower watering spot (point B) on the Frank Ranch on Valley Creek. These flow measurements were taken on June 22, 1977 and the results were at Point A-230 gpm and at Point B-270 gpm.

Administrative Notice was also taken of the application by Jake Frank to appropriate water from Valley Creek at points in the N1/2 SE1/4 and SE1/4 SW1/4, both Section 27, Township 1 South, Range 22 East, M.P.M., Stillwater County, Montana. The water sought to be appropriated would be used for a new sprinkler from May 1 to September 1, inclusive, of each year, on a total of 20 acres, more or less, the SW1/4 of Section 27, Township 1 South, Range 22 East, Stillwater County, Montana. The water sought to be appropriated by the application would be diverted at a rate not to exceed 0.66

cubic feet per second or 300 gallons per minute and a quantity of 40 acre-feet per annum. The proposed point of diversion and the proposed place of use under this application by the Objector, Mr. Jake Frank, is located upstream from the proposed points of diversion of Mr. John Mohr and Mr. Henry Steinmetz. This application was submitted on September 13, 1976.

As required by law, the Hearing Examiner hereby makes the following Findings of Fact, Proposed Conclusions of Law and Proposed Order to the Administrator, Water Resources Division, Department of Natural Resources and Conservation.

PROPOSED FINDINGS OF FACT

1. On April 1, 1976 at 11:10 a.m. the Department received an Application for Beneficial Water Use Permit No. 7869-s43QJ by Henry E. Steinmetz seeking to appropriate 1.33 cfs or 600 gallons per minute of water, not to exceed 170 acre feet per annum from Valley Creek, a tributary of the Yellowstone River, in Stillwater County, Montana, to be diverted from Valley Creek by means of a portable pump, at points in the SW1/4 NW1/4 SW1/4 of Section 35, Township 1 South, Range 22 East, M.P.M., and the NW1/4 SW1/4 NW1/4 of Section 2, Township 2 South, Range 22 East, M.P.M., and used for new irrigation on 20 acres in Section 35, Township 1 South, Range 22 East, M.P.M., and 35 acres in Section 2, Township 2 South, Range 22 East, M.P.M., and containing a total of 55 acres, more or less, from May 1 to September 30, inclusive, of each year.

2. On September 11, 1976, at 6:27 p.m., the Department received an Application for Beneficial Water Use Permit No. 9527-s43QJ by John W. Mohr seeking to appropriate 2.49 cfs or 1,122 gallons of water per minute, not to exceed 285 acre feet per annum, from Valley Creek, a tributary of the Yellowstone River in Stillwater County, Montana, to be diverted from Valley Creek by means of a portable pump, at two points in the NE1/4 SW1/4 NE1/4 and one point in the SW1/4 NW1/4 NE1/4 all in Section 34, Township 1 South, Range 22 East, M.P.M., and used for new irrigation on 75 acres and for supplemental irrigation on 30 acres, all in said Section 34, and containing a total of 105 acres, more or less, from May 1 to October 10, inclusive, of each year.

3. On September 13, 1976, the Department received an objection to the application of Mr. Henry E. Steinmetz, from Mr. Jake Frank alleging a prior stockwater right, used by the Objector since 1938. The Objector further indicated that the Applicant's request would deplete water, stop its running in the winter, would dry up seeps and springs, and take away Objector's livestock water. Further that there is not that much water available in Valley Creek.

4. On November 3, 1976, the Department received an objection to the application of Mr. John W. Mohr, from Mr. Jake Frank alleging that he is entitled to 200 miners inch flow and that him and his predecessors have owned the land since 1908, and that he wants his water rights fully protected.

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That water in Valley Creek is the sole source of water for Mr. Frank's livestock and that the Applicant's request would deplete water, stop its running in the winter, and would dry up seeps and springs. Further that there is not that much water available in the creek with all the applications now filed.

5. Since the issues and parties were almost identical in the proceedings under each application, a consolidated hearing was held and thus a consolidated proposal will be issued.

6. Mr. Mohr testified that his predecessor in interest, Mr. William W. Kinnick, had filed a water right on January 2, 1900 and recorded it January 23, 1900. That the filed right was for 200 miners inches or 5 cfs or 37.4 gallons per second. Mr. Mohr further testified that he had purchased the 1/4 Section in question from a Mr. William Southworth in 1960 and had later purchased the above water right from Mr. Southworth in 1966.

7. Mr. Mohr testified that he had sprinkle irrigated one of the tracts covered under this application in 1971 for about 3 days and may have irrigated approximately 3 acres. He again pumped in 1975 but just for a very short period of time. The volume flow at both times was 1 cfs. Mr. Mohr testified that he was not aware or sure that any irrigation had been accomplished previously to his having irrigated any of the property in 1971 but that if there had been any irrigation under the 1900 filed water, right that it would

only have been approximately 30 acres. That the present existing ditch on the property in question was placed there by Mr. Mohr.

8. From testimony given by Mr. Mohr, it appears that the total acreage applied for in the application was in error; that Mr. Mohr only intends to irrigate a total of 75 acres under this application. Thus the application was accordingly amended and modified.

9. Mr. Mohr further testified that he feels that he already has an existing water right to the waters of Valley Creek for stockwatering purposes.

10. Mr. Mohr indicated that during the spring period there is a high runoff on Valley Creek. That this runoff sometimes extends to the middle of June and depending upon the rains that are received there may be periods of high water from June to the middle of July in many years.

11. Mr. Steinmetz testified that he had several prior water filings on the property in question. Briefly those rights are as follows:

a. A Notice of Water Right by William M. Miller, filed August 4, 1885 and recorded in Book 1 of Water Rights, Page 1, Records of Yellowstone County, State of Montana, and found in Book 2, Page 215 of the Records of Stillwater County. The said water right was for 200 miners inches to be diverted from Valley Creek on the west bank and was appropriated on the 15th day of July, 1885.

b. A Notice of Appropriation by Walter D. Story for 200 miners inches of Valley Creek and that the waters shall be appropriated on May 5, 1910 and that the appropriator intends to prosecute the work of building the required dam and ditch with all reasonable diligence. This right was filed in book 2, Page 64 of the Records of Stillwater County.

c. A declaration of water right that indicates a claim to a right on Valley Creek originating from December 10, 1879 by a William M. Miller. It is found in Book 2, Page 6 of Miscellaneous Records and was filed on June 10, 1884.

d. A Notice of Water Right dated June 15, 1908 and filed July 2, 1908, recorded also in Miscellaneous Book 2, Page 38. This is a claim to the use, possession, and control of 200 miners inches or 5 cubic feet of water of Valley Creek claimed by a Mr. George W. Games.

12. There was testimony given at the hearing as to the dam which was pictured in Steinmetz's Exhibit No. 1. The dam was constructed by a Mr. J. L. Keefer who was the incorporator of the Yellowstone Grain Company from whom in 1974 the Applicant, Mr. Steinmetz, purchased the property in question. From testimony given at the hearing, this dam was possibly the third dam constructed on Valley Creek and was used to irrigate the 55 acres in question. It appears from testimony given at the hearing that the dam was constructed sometime during the fourties, possibly 1947.

13. The Applicant, Mr. Steinmetz, intends to revitalize the dam presently found there and use it as a point of diversion. The Applicant, Mr. Steinmetz, further intends to establish a second point of diversion downstream from the present dam and place a pump in Valley Creek and irrigate the lower field. This would help alleviate some of the problems mentioned by the testimony given by Mr. Steinmetz and Mr. Frank in that it is difficult to get water except during periods of rain and high runoff. Mr. Frank indicated that the Storys, who resided on the property in question for some years, had great difficulty in irrigating the last field in question.

14. Mr. Frank testified as to his ranch operation and as to the use of Valley Creek water by him. The critical usage of Valley Creek water by the Objector, Mr. Frank, appears to be for stock water at point B on Frank Exhibit No. B. This appears to be the main watering point in what has been noted as pasture seven. There is also a water gap in what has been noted as pasture eight, also on Frank Exhibit B.

15. Mr. Frank indicated that he had the majority of his cattle located in pasture seven from the first part of January to the first part of June. That from the first part of June to sometime in August there were approximately ten broodmares located in pasture seven. That in total there may be approximately 275 head of cattle located in pasture

seven. While the livestock are located in pasture seven, the primary and possibly the only source of water may be Valley Creek.

16. Mr. Frank testified that he was concerned about lack of water for his livestock at both the water gap and point B located on Frank Exhibit B. Mr. Frank further indicated that the proposed irrigation could possibly dry up the creek and cause springs in the area to go dry. He seemed to feel that return flow would not return to the creek and would be lost outside the drainage. There was no basis for such hydrological conclusions except his own personal opinion.

17. The Objector, Mr. Frank, indicated that while Valley Creek was extremely low this year there did seem to be enough water in there to satisfy at least his livestock watering needs. That according to Frank Exhibit C such measurements, at least as of June 22, 1977, at point B, the flow volume is 270 gallons per minute. From testimony given at the hearing and from indications from Mr. Frank, there may be times of the year, particularly when Mr. Frank has a reduced number of livestock in pasture seven, that such volume flow would be an excess of that which was needed to supply his livestock watering needs.

18. As indicated from Frank Exhibit C, which shows that there were 230 gallons per minute flow on June 22, 1977 at point A and 270 gallons per minute flow at point B, there

is a certain degree of "spring" return flow to Valley Creek from point A to point B which is the area sought to be irrigated by the applications herein. Thus by such figures and by observation of the area, it appears that any return flow that the above sought for irrigation would cause, would return to Valley Creek instead of being lost in another drainage or another area.

19. Valley Creek has irregular flow, at certain times of the year being rather low and other times it being rather high, particularly during the high spring runoffs or during heavy rain showers. Also there are years when there is more water flowing in Valley Creek throughout the year and other years such as this year when Valley Creek is extremely low. It would appear that during years like 1977 that there would not be enough water to supply the proposed diversion requirements sought by the Applicants herein. Yet from testimony given at the hearing there also appears to be years where there is sufficient water to supply the irrigation requirement sought herein by the Applicants. Water would be available during the spring in almost all years.

At the conclusion of the presentation of evidence the Objector, through his attorney, Mr. Sheehy, moved that the applications be dismissed for failure of proof in that there are no unappropriated waters in the source of supply. As indicated from the testimony at the hearing such motion will hereby be denied. There are unappropriated waters in the source of supply, at least during certain times of the

irrigation season such as in early spring and during certain years. Granted, there are maybe years when there will be very little water available for appropriation such as in 1977.

From the foregoing Proposed Findings of Fact, the following Proposed Conclusions of Law are hereby made:

PROPOSED CONCLUSIONS OF LAW

1. Under the provision of Section 89-880, R.C.M. 1947, a permit is required to appropriate water from Valley Creek.

2. There are times when there exists unappropriated waters in the source of supply available for appropriation by the Applicants for irrigation.

3. Pursuant to 89-886(1), R.C.M. 1947, the valid rights of prior appropriators must be protected in the issuance of a beneficial water use permit.

4. The rights of prior appropriators can be protected if the permit is conditioned.

5. The proposed means of diversion is adequate for the purposes of the Montana Water Use Act.

6. The proposed use of water constitutes a beneficial use.

7. The proposed use will not interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved.

8. The Application for Beneficial Water Use Permit should be granted in accordance with provisions of Chapter

8, Title 89, of the Revised Codes of Montana.

9. Nothing decided herein has bearing upon the status of water rights claimed by the Objector, except in relation to the rights herein applied for, to the extent necessary to reach a conclusion herein.

10. The Objector, Mr. Frank, has an apparent existing water right of the waters of Valley Creek for livestock watering. That Mr. Frank further has a provisional permit which is subsequent to the rights in question including the permit applications to irrigate 20 acres in Section 27 of Township 1 South, Range 22 East, M.P.M.

11. That the Applicant, Mr. Steinmetz, has an apparent existing water right either through a filed appropriation or a use right to irrigate most of if not all of the 55 acres included under his application.

12. The Applicant, Mr. Mohr, has an apparent existing water right, either filed or a use right to irrigate at least a portion of the 75 acres covered in his application. That it further appears from the testimony that this existing water right would at most include approximately 30 acres of the 75 acres sought to be irrigated.

Based upon the above Proposed Findings of Fact and Proposed Conclusions of Law, the following Proposed Order is hereby made.

PROPOSED ORDER

1. Subject to the conditions cited below, the Applicant

Provisional Permit No. 9527-s43QJ by John W. Mohr is hereby granted allowing the appropriation of 2.49 cfs or 1,122 gallons of water per minute, not to exceed 176.4 acre feet per annum, from Valley Creek, a tributary of the Yellowstone River, in Stillwater County, Montana, to be diverted from Valley Creek by means of a portable pump, at two points in the NE1/4 SW1/4 NE1/4 and at one point in the SW1/4 NW1/4 NE1/4, all in Section 34, Township 1 South, Range 22 East, M.P.M., and used for new irrigation on 45 acres and for supplemental irrigation on 30 acres, all in said Section 34, and containing a total of 75 acres, more or less, from May 1 to October 10, inclusive, of each year.

2. Subject to the conditions cited below, the Applicant's Provisional Permit No. 7869-s43QJ by Henry E. Steinmetz is hereby granted allowing for the appropriation of 1.33 cfs or 600 gallons of water per minute, not to exceed 170 acre feet per annum from Valley Creek, a tributary of the Yellowstone River in Stillwater County, Montana, to be diverted from Valley Creek by means of a portable pump, at points in the SW1/4 NW1/4 SW1/4 of Section 35, Township 1 South, Range 22 East, M.P.M. and the NW1/4 SW1/4 NW1/4 of Section 2, Township 2 South, Range 22 East, M.P.M., and used for new irrigation on 20 acres in Section 35, Township 1 South, Range 22 East, M.P.M., and 35 acres in Section 2, Township 2 South, Range 22 East, M.P.M., and containing a total of 55 acres, more or less, from May 1 to September 30, inclusive, of each year.

3. A Provisional Permit is granted subject to all

prior water rights in the source of supply. The Applicants may not divert water when there is an insufficient water supply to satisfy existing water rights. The Applicants shall not under these Provisional Permits reduce the flow of Valley Creek below 270 gallons per minute at the Frank Ranch livestock watering point in Section 2, Township 2 South, Range 22 East, M.P.M., when Mr. Frank or his successor in interest has more than 300 head of cattle watering at said point. Such level of flow can be reduced when the number of cattle watering at said point are reduced accordingly. By this there will be no need to have 270 gallons of water flowing at said point when there may be only 10 broodmares watering at said point. Yet at no time shall the Applicants be allowed through the use of these Provisional Permits be allowed to completely eliminate the flow of water at such point even if there is no livestock. In otherwords the Applicants shall not be allowed by these permits to pump the creek dry at any time.

3. The issuing of a Provisional Permit by the Department in no way reduces the Applicants' liability for damages caused by the Applicants' exercise of its Provisional Permit, nor does the Department, in issuing a Provisional Permit, in any way acknowledge liability for damage caused by the Applicants' exercise of its Provisional Permit.

4. These Provisional Permits are granted subject to any

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final determination of prior existing water rights in the source of supply provided for by Montana law.

5. Nothing decided herein has bearing upon the status of water rights claimed by the Applicants other than those herein applied for, nor does anything herein have bearing upon the status of the claimed rights of the Applicants or any of the parties except in relation to those rights herein applied for, to the extent necessary to reach a conclusion herein.

NOTICE

This is a Proposed Order and will not become final until accepted by the Administrator of the Water Resources Division of the Department of Natural Resources and Conservation. Written exceptions to the Proposed Order, if any, shall be mailed to the Department within ten (10) days after receipt of service of the Proposal for Decision upon parties herein. No extensions of time for filing exceptions will be granted. Upon receipt of any written exceptions opportunity will be provided to file briefs and to make oral arguments before the Administrator of the Water Resources Division.

DATED this 9th day of January, 1978.


GARY L. SPAETH
HEARING EXAMINER

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